

Special Edition on  
AGM conveying  
through Electronic  
means



Mysuru Chapter  
**e-Magazine**

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194<sup>th</sup> Edition

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"To be a global leader in  
promoting good  
corporate governance"

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## From the Desk of Chairman

**CS Parvathi K R**

*Chairperson*

**Dear Professional colleagues,**

Greetings from the Mysuru Chapter of ICSI!!

I take this opportunity to thank all corona warriors! you have provided immense service in each nook and corner. We are safe; credit goes to all the frontline workers. Thank you so much!

Institute has taken various measures for the safety as well as overall professional development of students. Due to this Covid 19 Pandemic-. Examination which was scheduled to start from 6th July to 16th July has been further postponed to 18th August to 28th August 2020. Institute has started online classes. Students to take advantage of such classes. While waiting for the Exams, students need to utilize the time available, for skill development activities which are most required for the budding Company Secretaries.

Further, I wish all the best to our students, who are all set to give their best in the exams. Be confident and be positive. Trust your talent and hard work. In addition, it is the high time to be Patient too!

"Be the change that you wish to see in the world." Words of our father of nation -Mahatma Gandhiji. It is high time to practice those words. From the physical platform to Virtual Platform for all our programmes. Collages have shown interest to give their study platform for us to conduct Career Awareness Programmes.

15th June is the celebration of PCS Day. Happy PCS day to all!

It is our humble request - "Stay Safe! Keep Healthy! Support to the great extent!"

Feel free to share inputs, feedback and suggestions to continue this journey of growing together!



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Company Secretaries of India**

**भारतीय कम्पनी सचिव संस्थान**

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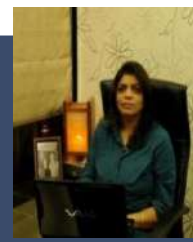
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# Checklist for Company Secretary to Plan for convening Annual General Meeting (AGM) through Electronic Means



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## A. Background of provisions relating to Annual General Meeting

**When** : Section 96 of the Companies Act, 2013 (“the Act”) and para 2 of SS-2 requires that all companies registered in India, other than a One Person Company, is required to hold an Annual General Meeting (AGM) each calendar year in addition to other General Meeting. A newly incorporated company is required to convene its 1<sup>st</sup> AGM within a period of nine months from the date of closing of its 1st financial year and in any other case, within a period of six months, from the date of closing of the financial year. If a company holds its 1st AGM as aforesaid, it is not required to hold any AGM in the year of its incorporation. The gap between two AGM (including the Adjourned AGM) should not exceed more than fifteen months. Every AGM shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday (means and includes a day declared as National Holiday by the Central Government).

**Where** AGM if called physically and not through VC or OAVM, shall be held either at the Registered Office of the company or at some other place within the city, town or village in which the Registered Office of the company is situate. However, AGM of an unlisted company may be held at any place in India, if consent is given in writing or by electronic mode by all the members in advance.

**For what** AGM as the name suggest is annual meeting where in four Ordinary Businesses to be transacted as mentioned under Section 102 (2) of the Act and all other business are considered as Special Business. In this year 2020, the AGM, if convened through electronic mode, it is suggested to transact only four Ordinary Business unless other businesses are unavoidable to be differed.

**General Circular No. 18/2020** This year considering the Covid-19 Pandemic, MCA has vide General Circular No. 18/2020 dated April 21, 2020 gave relaxation to the companies whose financial year ended on December 31, 2019, by extending the time for convening AGM, on or before September 30, 2020 (nine months from the end of FY).

“If any Company is unable to hold the AGM in this year 2020, in accordance with Section 96 and as per framework provided under Ministry of Corporate Affairs (MCA) General Circular No. 20/2020 dated May 05, 2020 (“the said Circular”), it may have to make an Application with the concerned Registrar of Companies of the State where it has its Registered Office, for extension of time for holding the AGM (other than the first AGM) by a further period not exceeding three months.

Similar extension is expected from MCA for the companies whose financial year ended on March 31, 2020 to convene AGM on or before December 31, 2020 (nine months from the end of FY) without making any Application to the concerned Registrar of Companies, as making such an Application will have an extra cost to the Company. However, till June 06, 2020, MCA has not yet announced such relaxation and we are hopeful that MCA will consider the situation and announce such relaxation in time to come.

**General Circular No. 20/2020** Due to COVID-19 Pandemic and the restrictions on the movement of persons at several places in the country, Ministry of Corporate Affairs (MCA) has on May 05, 2020 vide General Circular No. 20/2020 (“the said Circular”) provided relaxation to companies to conduct the AGM this year 2020 through Video Conferencing facility (VC) or Other Audio Visual Means (OAVM) subject to manner and modes prescribed in the said Circular and also in line with General Circular No. 14 / 2020 and 17/2020 dated April 08, 2020 and April 13, 2020 respectively.

### **Which company can convene AGM through Electronic Mode?**

As per the said Circular, the company which is not mandatorily required to provide the facility of remote e-voting under the Act, may conduct AGM through VC or OAVM only, which has in its records, the email addresses of at least half of its total number of members, who

- a) In case of a Nidhi company, hold shares of more than Rs.1000/- in face value or more than 1% of the total paid-up share capital, whichever is less;
- b) In case of other companies having share capital, who represent not less than 75% of such part of the paid-up share capital of the company as gives a right to vote at the meeting;
- c) In case of companies not having share capital, who have the right to exercise not less than 75% of the total voting power exercisable at the meeting.

**Note** -The company to ensure that both the conditions to be complied with and not just one that is (a) having email address of 50% of number of members; and (b) such members are having threshold of holding of shares or voting power as mentioned above.

Hence, the Company should contact all its members through telephone or other means requesting them to register their email address with the Company to enable the Company to convene the AGM by VC/OAVM.

The said Circular is just giving additional option to the company to convene AGM through electronic mode instead of holding AGM with physical presence of members.

**B. Checklist/ Steps plan for convening AGM** Following is a broad Checklist/ Step Plan to assist the Company Secretary or a Compliance Officer/ Management to consider for convening and conducting AGM of the Company this year 2020 through VC/OAVM in accordance with the Act, the said Circular, SEBI (LODR), 2015 (only to comply by listed entities) and Secretarial Standard -2 (SS-2) issued by the Institute of Company Secretaries of India (ICSI) as on 1st October 2017.

### Action to be taken prior to AGM

Sl No.	Particulars
1	For Unlisted companies always check the provision of Article of Association (AoA) and also Shareholders Agreement/ Joint Venture Agreement, if any, with reference to provisions for convening AGM like Chairman of the AGM, quorum requirement, approval in advance of any Nominee Director, mode of dispatch and time period for dispatch of Notice for the AGM etc;
2	Check with the Accounts department of the Company for final review of financials and check with Audit Team for their final report , ensure obtaining of declaration from all Directors that he is not disqualified to act as a Director, for listed company as per SEBI (LODR), 2015 regulation a certificate to be obtained from Practicing Company Secretary that none of the Directors on the Board of the Company have been debarred or disqualified from being appointed or continuing as Directors of companies by the Board/Ministry of Corporate Affairs or any such statutory authority and ensure to obtain a declaration from the Independent Director in compliance with the Act and SEBI (LODR) 2015;
3	Check with Registrar & Share Transfer Agent (RTA), if any or In-house Secretarial Department about the availability of final list of all Members with their address and email id registered with the Company;
4	Coordinate with Independent Directors and Chairman of Audit Committee about their query and their availability for Board Meeting and AGM. Check with the Chairman of the Audit Committee, Nomination and Remuneration Committee and Stakeholders Relationship Committee about their availability in attending the AGM. If they are unable to attend, then get them to authorize another Committee Member of respective Committee to attend the AGM (as per Para 4.1 of SS-2 );
5	Coordinate with Depositories (NSDL/CDSL) and RTA for remote e-voting facility as per section 108 and Rule 20 of Companies (Management and Administration) Rules, 2014 of the Act and also for e-voting process during the AGM;  <u>Note:</u> Providing of remote e-voting facility is mandatory for listed Company and Company having more than 1000 members;
6	Propose and take draft oral consent from the Scrutinizer, confirming that if he/they is/are appointed for remote e-voting or e-voting during the AGM, he/they is/are available and can take up the assignment;
7	Finalise with the Chairman, the Chairman's Speech for AGM;

8	Finalise with Chairman Notice and detailed agenda for convening of Board Meeting , agendas like approval of draft Financials, Management Discussion and Analysis Report (MDA), Directors Report, review Corporate Governance Report, recommend Dividend, if any, retirement of director by rotation, proposal of appointment of Independent Director, or appointment of Statutory Auditors, if required, finalise the Notice of convening of AGM with Explanatory Statement ;
9	Finalise Notice and Agenda for convening of Audit Committee meeting to consider the financials;
10	If dividend is likely to be recommended, ensure opening of Bank Account for payment of Dividend as required under the Act and also compliance of the provisions under Section 123 to 127 of the Act including preparation for obtaining RBI approval for printing MICR number on dividend warrants and informing Bank in advance to test run the data of ECS for dividend ;
11	Check whether company require to fix a record date or intends to close Register of Members or the Register of Debenture-holders or the Register of other security holders. If it is fixed then the Company (Listed entities) require to send an advance intimation of seven days to the Stock Exchange as per SEBI (LODR), 2015;
12	Finalise a dedicated helpline number for assisting members for use of technology before and during the AGM for their smooth participation in the AGM;
13	Create a dedicated email Address of the Company or give access to virtual data room by giving log in IDs, for giving inspection of documents, if requested by any Member.  The Register of Directors and Key Managerial Personnel and their shareholding, maintained under Section 170 of the Act, and the Register of Contracts or Arrangements in which the directors/ KMPs are interested, maintained under Section 189 of the Act and all documents referred to in the Notice convening AGM to be made available for electronic inspection without any fee from the members before the AGM and during the AGM ;
14	If AGM is proposed to be held through VC/OAVM, then as per the said Circular please take note that except four Ordinary Business as per section 102 (2) of the Act, other Special Business can be proposed, if the same are unavoidable;
15	Before deciding time for conducting AGM through VC/OAVM, check the convenience of Members residing in different time zones;
16	Dispatch Notice and detailed Agenda to the Board for the Board Meeting along with the draft Financials, Auditors Report, Directors Report, Secretarial Report and Notice with Explanatory Statement for convening AGM and other relevant documents;



17	After the Board Meeting and approval of the Board on various agenda items, check to do all compliances as may be required under the Act and SEBI (LODR) for listed entities;
18	After the Board Meeting, send confirmation to Scrutinizer of their appointment by the Board;
19	After the Board Meeting, if the Board has recommended the Dividend ensure process in place for compliance of issuance of Dividend Warrants or ECS for payment of Dividend, if declared by the members in AGM, as required under the Act;
20	The companies, which are not mandated or voluntarily opted for remote e-voting, may choose to send poll paper / ballot paper along with the Notice of AGM, which the member can use for e-voting during the AGM as per the said Circular;
21	Keep all records of Members ready with their holding and Email address;
22	If details of members like their email Address is not available with the Company, the Company shall immediately make a public Notice in at least one vernacular newspaper in the principal vernacular language of the district in which the Registered Office of the Company is situated and having a wide circulation in that district, and at least one English newspaper having a wide circulation in that district, preferably both newspapers having electronic editions, asking details of members like email address and other details for payment of dividend if any;
23	<p>Ensure that the Final Notice is in accordance with the Act and the said Circular, otherwise the AGM will be considered as Invalid.</p> <p>Dispatch Notice convening of AGM through VC/OVAM along with other documents by Email to every Member (Equity/ preference/any other security holder) of the company, legal representative of any deceased member or the assignee of an insolvent member, liquidator of body corporate member which is under winding up, in case of joint shareholder to the first shareholder, Directors, Statutory Auditors, Secretarial Auditor, Debenture Trustees, if any, Bank and Financial Institution, JV partner or collaborator ( if agreement with them requires to do so) and to the Stock Exchanges (in case of listed entities);</p> <p><u>Note</u></p> <p>(a) Notice is not required to mention venue for AGM through VC/OAVM;</p> <p>(b) Notice shall not have Proxy Form and Road Map for AGM through VC/OAVM;</p> <p>(c) Notice is required to be sent by giving not less than 21 clear days as per section 101 of the Act (the date of service of Notice and the date of the Meeting are to be excluded) , however AGM can be convened by giving shorter notice than 21 clear days if consent in writing is accorded by not less than 95% of the number of members entitled to vote at the AGM; and</p>

	<p>(d) Refer section 20 of the Act and Para 1.2.2 of SS-2 which reads that if a Member requests for delivery of Notice through a particular mode, other than the one followed by the Company, he shall pay such fees as may be determined by the Company in its AGM and the Notice shall be sent to him in such mode. However, while convening AGM by VC/OAVM in this year in 2020 as per the said Circular, the Company can send the Notice and all documents only through email and shall be considered in compliance;</p>
24	<p><b>Notice of AGM to clearly state as follows:</b></p> <p>(a) the maximum number of members, who can participate in AGM through the VC/OAVM Facility, provided by NSDL/CDSL, on a first-come-first-served basis</p> <p>(b) that the AGM is proposed to be conducted through VC or OAVM in compliance with applicable provisions of the Act / Rules and the said Circular, date and time of AGM, General instructions for accessing and participating in AGM through VC/OAVM and remote e-Voting. It also specifies the date and time of commencement and end of Remote e-voting and contains a statement that at the end of Remote e-voting period, the facility shall forthwith be blocked;</p> <p>(c) that the facility for electronic voting system or ballot or polling paper shall also be made available at the AGM and members attending the AGM who have not already cast their vote by remote e-voting shall be able to exercise their right at the AGM;</p> <p>(d) that the member who has cast their vote by remote voting prior to the AGM may also attend the AGM but shall not be entitled to cast their vote again;</p> <p>(e) contact details of the official responsible to address the grievances connected with voting by electronic means;</p> <p>(f) the process and manner for voting by electronic means, the time schedule including the time period during which the votes may be cast by remote e-voting, the details about the login ID, process and manner for generating or receiving the password and for casting of vote in a secure manner;</p> <p>(g) the manner in which the members who are holding shares in physical form or who have not registered their email addresses with the Company, can cast their vote through remote e-voting or through e-voting system during the AGM;</p> <p>(h) clear instruction on how to participate and instruction for e-voting during the AGM;</p>

	(i) that a dedicated helpline number for assisting the Members for the use of Technology before and during the AGM;
	(j) the manner in which the member can get his email address registered with the Company who has not registered as yet;
	(k) that the Company which has not opted for remote e-voting facility as the same is not mandated and hence the members to take note that the AGM is proposed to be conducted through VC/OAVM in compliance with the said Circular and inform member about designated e-mail ID on which member can convey his vote, when poll is demanded in the AGM;
	(l) that facility for registration of Nomination by the member is available for those who holds the share in physical form and detailed manner of how to avail such facility;
	(m) that the Proxy won't be allowed in AGM to be convened through VS / OAVM;
	(n) that for body corporate a general guideline given like submitting Board Resolution or Power of Attorney with specimen signature of Authorized Representative and advisory note to not to share password for e-voting with anyone else;
	(o) that requesting members to complete and/or update their Residential Status, PAN, Category as per the IT Act with their Depository Participants or in case shares are held in physical form, with the Company by sending email to the Company's email address;
	(p) that the dividend/s, if any, declared by the Members will be paid to the Members as per their mandate registered with the Company or with their respective Depository Participants.
	(q) that process as to how any person who acquires shares of the Company after the Company sent the Notice of the AGM by email and hold the shares as on the cut-off date, may obtain the User ID and Password for voting in the AGM and a person who is not a Member as on the cut-off date should treat this Notice of AGM for information purpose only;
	(r) that advice to members that in terms of SEBI (LODR), 2015, securities of listed entities can only be transferred in dematerialized form with effect from 1st April 2019 and hence the members are advised who are holdings shares in physical form to dematerialize their shares;
25	AGM Notice with Annual Report to be prominently displayed on the website of the Company, if any;
26	AGM Notice with Annual Report also to be sent to Stock Exchange, in case of listed entities;

27	<p>Publish a Notice in the Newspaper at least in one vernacular newspaper in principal language of the district where Registered Office is situated having wide circulation in that district and at least one English newspaper having country wide circulation, at least 21 days before the date of AGM, specifying that</p> <ol style="list-style-type: none"> <li>a. business will be transacted through voting by electronic means and process mentioned in Rule 20 of Companies (Management and Administration) Rules, 2014 and</li> <li>b. other details as mentioned in the said Circular like statement that the AGM shall be convened through VC or OAVM; date and time of the AGM; availability of notice on the website of the company and stock exchange, if required; the manner in which the members can cast their votes who are holding shares physically and who have not registered their email addresses with the company; the manner in which the persons can get their email addresses registered; any other detail considered necessary by the company;</li> </ol>
28	Such Public Notice published in the newspaper to be placed on the website of the Company, if any and copy to be sent to the Stock Exchange, in case of listed entities;
29	Facility to be created for Members to submit their queries/ questions in advance to enable to reply it in the AGM;
30	Inform on website the manner in which Dividend will be paid and encourage Members to share ECS details to enable to pay them the dividend electronically;
31	Making all necessary disclosure as required under the Act as applicable to the Company;
32	Remote e-voting facility to be closed at 5.00 p.m. on the date preceding the date of AGM;
33	<p>Ensure capability of system of hosting up to 1000 members (for companies providing remote e-voting) or 500 members or members equal to the total number of members of the Company, whichever is lower (for company which is not required to provide remote e-voting).</p> <p>However, in order to avoid risks of technical disruption, the concrete feasibility and implementation of the technical requirements must be discussed and documented in close collaboration with Depositories, RTA, legal advisors, the technical service provider for the AGM and the Scrutinizers.</p>
34	Be prepared for any situation where request from the Members for additional agenda items may be received by the Company at least 14 days prior to the AGM;
35	Safeguards should also be taken well in advance of the AGM, in consultation with legal advisors of the Company, for any event which makes the Chairman of the Board who normally presides the AGM or Independent Director / Director / Scrutinizer incapacitated to attend AGM due to illness of Covid-19, the other Director to chair the AGM and two Scrutinizers to be appointed . We assume that considering the

	situation, if none of the Independent Director/ Auditors could either attend the AGM or give authority to other Director of the respective committees, due to last minute illness under COVID-19 , the resolutions approved in the AGM still remain valid.
36	The Company to encourage the Institutional Investors who are members of the Company, to attend and vote in the AGM.
<b>Action to be taken at the AGM</b>	
1	Remind the Chairman, Board Members including Independent Directors, Debenture Trustees, Statutory and Secretarial Auditors or their respective Representatives (who is also qualified to act as Statutory Auditor or Secretarial Auditor) and Scrutinizers, about their diaries and a day before the AGM give a courtesy call ensuring their presence in the AGM and if they need any technical support to enter in AGM to be convened through electronic mode;  <u>Note</u>  a. The Company can exempt Secretarial Auditor from remaining present at the AGM; b. Secretarial Auditor shall have the right to be heard at AGM on that part of the business which concerns him as Secretarial Auditor (refer para 4.3 of SS-2)
2	Readiness with following document by the CS and Chairman  (a) Collate all queries / questions which were received from the members and update about it to the Chairman and Key Managerial Personnel (KMP) who will be attending the AGM and are going to reply to the members in the AGM and  (b) Keep the Act, Memorandum & Articles of Association, Annual Report, copy of Notice of AGM ready before entering in AGM through VC/OAVM;
3	Ensure the AGM with VC/OAVM is open 15 minutes before the time of AGM to allow the participants to attend the AGM and ensure it remain open 15 minutes after closure of the AGM;
4	Coordinate closely with Depositories and RTA for the matters related to AGM and voting;
5	Provide VC facility and entering AGM through VC facility on first cum first serve basis;
6	Members holding 2% or more shareholdings, Directors, Promoters, Institutional Investors, KMPs. Statutory and Secretarial Auditors are allowed to participate without first cum first serve basis;
7	Ensure that the AGM through VC/OAVM allows two way teleconferencing or webex for the ease of participation of the members;

8	Maintain record of Members who have attended AGM through VC/OAVM;
9	<p>All the Directors are expected to attend the AGM. In case any Director is unable to attend the AGM, the Chairman should explain the absence of such Director at the AGM. Ensure that at least One Independent Director, if applicable and the Auditor to remain present in AGM</p> <p>Note: Company may exempt Auditors from remaining present in AGM, however it is advisable that the Auditors remain present in the AGM for replying any query related to accounts, by the members;</p>
10	Chairman of the Board presides over the AGM. However, in case of e-voting for election of Chairman is required, the Company Secretary to assist in the process;
11	If the Chairman is interested in any item of business, without prejudice to his Voting Rights on Resolutions, he shall entrust the conduct of the AGM, in respect of such item to any Dis-Interested Director or to a Member, with the consent of the Members present, and resume the Chair after that item of business has been transacted;
12	Attendance of participants to be acknowledged by the Chairman and the Chairman may mute all participants otherwise he cannot conduct the AGM smoothly;
13	Members who attend through VC or OAVM are counted for the purpose of reckoning quorum under Section 103 of the Act;
14	Chairman to ensure that the facility of e-voting system is available for the purpose of conducting a poll during the AGM held through VC/OAVM. Chairman to conduct the AGM in a fair and impartial manner and ensure that only such business as has been set out in the Notice convening AGM is transacted. He shall regulate the manner in which voting is conducted at the AGM keeping in view the provisions of the Act and the said Circular;
15	Assist the Chairman if required for Roll call and smooth conduct of the AGM. Assistance by the Company Secretary to Chairman is required (a)To enable the Chairman to identify that requisite Quorum is present ; (b)To enable the Chairman to ascertain the votes cast on each Resolution put to vote by e-voting at the AGM (c) To assist the Chairman in coordinating with the Members present and answering their queries; (d)To facilitate voting electronically at the AGM; (e) To analyse the result of Remote e-voting or e-voting at the AGM and facilitate declaration thereof ; and (f) To maintain the decorum of the AGM etc. ;
16	Chairman to state that inspection of records was made available on dedicated email address by the Company before and at the AGM;
17	Ensure required Quorum as per Section 103 of the Act is present throughout the AGM;

18	Ensure that no proxy is allowed in AGM convened through VC /OAVM;
19	Representatives are allowed after verifying BR / POA;
20	Provide live Webcast of the proceedings of the AGM, which is mandatory for only top 100 listed companies as per Regulation 44(6) of SEBI(LODR), 2015;
21	Ensure and assist in replying all questions or queries sent by the members either in advance on designated e-mail ID of the Company or during the AGM. However, the management must allow, and answer questions transmitted by electronic means at their own discretion and in accordance with their duties;
22	Ensure that members must also be given the opportunity to ask questions via electronic communication. It is not permissible to completely exclude the right to ask questions.  However, the same is at the discretion of the Chairman to unmute the member to allow him to speak at the AGM;
23	To note that the Chairman or the management may summarize their answers if there is a flood of questions. In the interest to have proper conduct of the AGM, the Chairman may take into account, among other things, whether the requested information can be obtained elsewhere in the Annual Report;
24	E-voting at the AGM is allowed for only those members, who are present in the AGM through VC/OAVM and who have not cast their vote through remote e-voting and are not barred from voting and assist Scrutinizer if required;
25	Modification in resolution: <ul style="list-style-type: none"> <li>a. No modification shall be made to any Resolution which has already been put to vote by Remote e-voting.</li> <li>b. However, the company which is giving e-voting during AGM can allow modification in the resolution. However, the proposed modification should not be so fundamental so as to destroy the intent of the original Resolution or to alter its effect to a major degree, qualitatively or quantitatively. Similarly, a modification which adds onerous conditions to a Resolution would not be admissible. This situation may arise in a private limited company. The Companies having more than 1000 members are required to give remote e-voting in which case no modification in resolution is allowed;</li> </ul>
26	For any adjournment of AGM-- A duly convened Meeting shall not be adjourned unless circumstances so warrant. The Chairman may adjourn the AGM with the consent of the Members, at which a Quorum is present, and shall adjourn AGM, if so directed by the Members ( para 15 of SS-2)

27	Chairman to provide e-voting facility at the AGM as per procedure mentioned above;
28	During the AGM through VC / OAVM, where a poll on any item is required, in such case the members shall cast their vote on the resolutions only at such stage on items considered in the AGM by sending email to the designated email address circulated by the Company through their email address(es) which are registered with the Company. Company Secretary to assist the Scrutinizer, if required;
29	Ensure proper recording and maintenance of Transcript of AGM;
30	AGM conducted through VC /OAVM may be adjourned by the Chairman, for declaring the result of voting after remote e-voting or e-voting is over for each resolution;
31	The qualifications, observations or comments or other remarks, if any, mentioned in the Auditor's Report on the financial transactions, which have any adverse effect on the functioning of the company and the qualifications, observations or comments or other remarks if any, mentioned in the Secretarial Audit Report issued by the Company Secretary in Practice, which have any material adverse effect on the functioning of the company shall be read at the AGM and attention of Members present shall be drawn to the explanations / comments given by the Board of Directors in their report;
32	Ensure each item of Agenda of Notice of AGM is transacted at the AGM;
33	Closure of AGM with vote of thanks to the Chairman.
34	<p>General Note:</p> <ol style="list-style-type: none"> <li>a. For any business of Related Party Transaction in AGM, ensure compliance of section 188 of the Act and SEBI (LODR), 2015;</li> <li>b. Companies offering the facility of Remote e-voting should not withdraw any Resolution once Notice of AGM has been issued;</li> </ol>
<b>Action to be taken after the AGM</b>	
1	Submission of Report by Scrutinizer to the Chairman of the Company or to any other person authorized by the Chairman after the completion of the scrutiny of the e-voting (votes casted during the AGM and votes casted through remote e-voting), within 48 hours from the conclusion of the AGM;
2	Upload the result of voting on each Resolutions placed in AGM along with the Report of Scrutinizer on Website of Company and submit the same to the Stock Exchange (in case of listed entities);
3	Transcription of AGM of public and listed company to be uploaded on website of the Company;



4	Report to Stock Exchange the outcome of AGM including a confirmation that the Meeting was convened, held and conducted as per the provisions of the Act (In case of listed entities) and such report to be a fair and correct summary of the proceedings of the AGM( refer para 19 of SS-2) ;
5	Deduction of TDS on Dividend;
6	Payment of Dividend by Electronic Clearing Service (ECS) or any other means and transfer unclaimed dividend to a separate bank account and follow up with Bank and RTA for reconciliation date;
7	In the event the Company is unable to pay the dividend to any Member directly in their bank accounts through Electronic Clearing Service or any other means, due to non-registration of the Electronic Bank Mandate, the Company shall dispatch the dividend warrant/ Bankers' cheque/ demand draft to such Member, at the earliest once the normalcy is restored;
8	Ensuring compliance of all other provisions related to AGM of the Company;
9	Filing of all necessary documents with regulatory authorities as required under the Act and other act, rules, regulations as may be applicable to the Company like Banking, Insurance, Housing Finance Companies etc.;
10	Finalize and get the signature on the Minutes of AGM within 30 days from the date of AGM;
11	Obtain signed copy of all Resolutions and Explanatory Statement, if any and file Form MGT 14 or GNL 2 for all resolutions approved in the AGM held through VC/OAVM with in maximum 60 days from the date of AGM, clearly mentioning therein that the mechanism provided under the said Circular and all other relevant provisions of the Act and rules were duly complied with by the Company;
12	Intimate Auditors (Statutory or Cost) about their appointment in AGM;
13	Filing of Form AoC-4 (standalone, consolidated, XBRL ) for Annual Report in 30 days from the date of AGM , Form ADT-1 for Auditors Appointment in 15 days from the date of AGM and Form MGT-7 for Annual Return in 60 days from the date of AGM along with required documents with the MCA;
14	Update Register of Directors and KMPs if any Director/ KMP is appointed or re-appointed and update the Statutory Register, if required, once the normalcy is restored.

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## A Peep into the nuances of the ACCOUNTING PROCESS under Revaluation model of Ind AS 16 - PROPERTY, PLANT AND EQUIPMENT.



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### **ILLUSTRATION No.1 (Para 39 of Ind AS 16/IAS 16):**

Restore India Limited, on 1-4-2016, acquired a huge Diesel Generator set as a stand-by arrangement to reduce ill-effects of Power interruption and capitalized the same at Rs.20,00,000, with no component accounting envisaged, subject to depreciation @20% on SLM basis and a useful life of 5 years having no residual value. On 1-4-2018, the entity decided to adopt revaluation model. With the following information, the required Journal entries and Ledger Accounts are given below (accounting entries relating to depreciation accumulated on the date of Revaluation, restatement of the Fixed assets and their disclosure etc., as per Para 13.3 of the earlier AS- 10 Accounting for Fixed Assets have been elaborately dealt with in my earlier Article appearing in the e-magazine of the Mysore Chapter of ICSI- Edition 128-September 2014) :

Sl no	Particulars	Amount
1.	Original Cost	20,00,000
2.	Accumulated depreciated on the date of Revaluations	8,00,000
3.	Carrying Value on the date of Revaluation (a-b)	12,00,000
4.	Fair Value on the date of Upward Revaluation (1-4-2018).	14,00,000
5.	Increase in the Carrying value consequent upon Upward Revaluation	2,00,000

The Journal entries and Ledger Accounts are given below:

Particulars	Amount	Amount
1. 1-4-2018 Accumulated depreciation A/c Dr ** To Diesel Generator Set  (Being the depreciation accumulated before the upward revaluation set off against original cost of the Diesel Generator set)	8,00,000	8,00,000

Particulars	Amount	Amount
2. 1-4-2018 Diesel Generator Set A/c Dr To Revaluation Gain  (Being the Revaluation Gain on upward Revaluation of Diesel Generator set recognized)	2,00,000	2,00,000
3. 31-3-2019 Revaluation Gain      Dr To Other Comprehensive Income A/c  (Being the Revaluation gain on upward Revaluation of Diesel Generator set transferred to Other Comprehensive Income Account)	2,00,000	2,00,000

4. 31-3-2019		
Other Comprehensive Income A/c Dr		
To Assets Revaluation Reserve	2,00,000	1,40,000
To Deferred Tax liability		60,000
(Being the Revaluation gain on upward Revaluation of Diesel Generator Set transferred to Revaluation Reserve net of Deferred Tax Liability computed at 30%).		

In the Indian context, this account is named “Provision for Depreciation”, the closing balance of which is nothing but the accumulated depreciation simpliciter.

LEDGER ACCOUNTS			
1. Accumulated Depreciation			
To Diesel Generator set Account	8,00,000	By balance b/f	8,00,000
2. Diesel Generator set Account			
To bal b/f	20,00,000	By accumulated depreciation	8,00,000
To Revaluation Gain	2,00,000	By balance c/f	14,00,000
	22,00,000		22,00,000
3. Revaluation Gain account			
To other comprehensive income	2,00,000	By Diesel generator set account	2,00,000
4. Other comprehensive account			
To asset revaluation reserve	1,40,000	By Revaluation gain	2,00,000
To deferred tax liability	60,000		

5.Assets revaluation reserve account			
To balance C/f	1,40,000	By other comprehensive income account	1,40,000
6. Deferred tax liability account			
To Balance c/f	60,000	By other comprehensive income account	60,000

The Book base and Tax base of Diesel Generator set being different for the purpose of Depreciation during its remaining useful life, in the sense, since Tax base is lower than the Book base, a Deferred Tax Liability arises and needs to be recognized in terms of Ind As 12-Income Taxes.

Assets Revaluation Reserves is disclosed on the Balance sheet under “ Other Equity” supported by details in the Note “Statement of Changes in Equity”.

#### **ILLUSTRATION No.2 (Para 40 of Ind AS 16/IAS 16):**

In continuation with the illustration No.1, Let us assume that M/s Restore India Limited decided to revalue the Diesel Generator Set downwards on 1-4-2020. Following are the details.

Sl no	Particulars	Amount
1.	Substituted Carrying Value consequent upon first time upward revaluation on 1-4-2018	14,00,000
2.	Depreciation [ for 2 years- 2018-19 and 2019-2020] on the date of downward revaluation based on the remaining useful life on the substituted carrying value at Sl.No. (1) above	9,33,000
3.	Net Carrying Value on 1-4-2020, i.e, the date of Downward revaluation (1 -2)	4,67,000
4.	Fair Value on 1-4-2020	1,17,000
5.	Loss on downward Revaluation on 1-4-2020	3,50,000

The required Journal Entries and Ledger Accounts are as under:

Sl no	Date	Particulars	Amount	Amount
1.	1-04-2020	Accumulated Depreciation on Diesel generator set A/c Dr To Diesel Generator set account	9,33,000	9,33,000
2.	31-03-2021	Loss on downward revaluation-diesel generator set A/c Dr To diesel generator set account	3,50,000	3,50,000
3.	31-03-2021	Asset revaluation reserve A/c Dr To other comprehensive income account  (Being the entry to now reverse the former account earlier recognized in the latter account due to subsequent loss on downward revaluation)	1,40,000	1,40,000
4.	31-03-2021	Other comprehensive income A/c Dr To loss on downward revaluation of DG set  (Being the entry to close the latter account by transfer to the former account)	1,40,000	1,40,000
5.	31-03-2021	Profit & Loss account Dr To Loss on downward revaluation  (Being the loss on downward revaluation in excess of the amount available in the asset revaluation reserve charged to the former account)	2,10,000	2,10,000
6.	31-03-2021	Deferred Tax liability A/c Dr Deferred Tax Asset A/c Dr To other comprehensive income A/c  (Being the deferred tax asset recognized in the OCI account based on the income tax rate of 30% on the loss due to downward revaluation of diesel generator set, net of the earlier deferred tax liability created in upward revaluation on 01-04-2018)	60,000 45,000	1,05,000

LEDGER ACCOUNTS			
1. Accumulated Depreciation Account- Diesel Generator Set			
To Diesel set	9,33,000	By Balance B/f	9,33,000
2. Diesel Generator Set Amount			
To balance B/f	14,00,000	By accumulated Depreciation	9,33,000
		By loss on downward revaluation DG set	3,50,000
		By Balance C/f	1,17,000
3. Loss on downward revaluation of DG set A/c			
To diesel generator set A/c	3,50,000	By profit and loss, A/C	2,10,000
		By other comprehensive income	1,40,000
4. Other comprehensive income account			
To loss on downward revaluation of Diesel generator Set	1,40,000	By asset revaluation reserve	1,40,000
To balance C/f	1,05,000	By deferred tax liability	60,000
		By deferred tax asset	45,000
5. Asset revaluation reserve account			
To other comprehensive income A/c	1,40,000	By balance B/f	1,40,000

6. Profit & loss Account			
To loss on downward revaluation of DG set A/c	2,10,000		
7. Deferred Tax liability account			
To other comprehensive income A/c	60,000	By balance B/f	60,000
8. Deferred Tax asset account			
To other comprehensive A/c	45,000	By balance C/f	45,000

It may please be noted that at the tax rate of 30% as in Illustration -1, a Deferred Tax Asset (DTA) of Rs. 1,05,000/- has now emerged due to a Temporary Difference (Tax Base is more than the Book base of the Diesel Generator Set consequent upon its downward revaluation), necessitating its recognition in

“Other Comprehensive Income”. For this purpose, it could be more appropriate to reverse the existing Deferred Tax Liability (DTL) and creating a DTA only for the differential amount. As such, a fresh Deferred Tax Asset may be created for Rs.45,000 together with the reversal of the existing Deferred Tax Liability by a corresponding credit to Other Comprehensive Income account for Rs.1,05,000/-.

Balance in the OCI Account is disclosed as Other Comprehensive Income in the “Statement of Changes in Equity” which is a part of Balance sheet.

## EPILOGUE:

Before concluding, contextually it may be interesting to look at the prescriptions relating to the utilization of the Revaluation Reserve. As per Para 41 of the Ind As 16/IAS16 reproduced below, an Option is given to transfer it to Retaining Earnings on DE recognition of the revalued asset and utilize it for charging additional depreciation arising out of upward revaluation when the upwardly revalued asset is still in use. It may also please be observed that this is not a requirement, but only an Option (by virtue of the word “MAY” used therein).

## Quote:

14. The revaluation surplus included in equity in respect of an item of property, plant and equipment **may** be transferred directly to retained earnings when the asset is derecognized. This may involve transferring the whole of the surplus when the asset is retired or disposed of. However, some of the surplus **may** be transferred as the asset is used by an entity. In such a case, the amount of the surplus transferred would be the difference between depreciation based on the revalued carrying



*amount of the asset and depreciation based on the asset's original cost. Transfers from revaluation surplus to retained earnings are not made through profit or loss.*

### **Unquote:**

In fact, even before the convergence with IFRS, our AS-10 "Accounting for Fixed Assets" also, did contain a similar option as is evident from its Para 14.4 (its last sentence deserves emphasis) besides the Para 44 of the subsequent pre-convergence Accounting Standard AS-10 "Property plant and Equipment. Both are considered opportune to be reproduced below for a comparative understanding:

### **Quote:**

#### **1. AS-10 "Accounting for Fixed Assets":**

*14.4 On disposal of a previously revalued item of fixed asset, the difference between net disposal proceeds and the net book value is normally charged or credited to the profit and loss statement except that, to the extent such a loss is related to an increase which was previously recorded as a credit to revaluation reserve and which has not been subsequently reversed or utilized, it is charged directly to that account. The amount standing in revaluation reserve following the retirement or disposal of an asset which relates to that asset may be transferred to general reserve.*

#### **2. AS-10 "Property, Plant and equipment":**

*44. The revaluation surplus included in owners' interests in respect of an item of property, plant and equipment may be transferred to the revenue reserves when the asset is derecognized. This may involve transferring the whole of the surplus when the asset is retired or disposed of. However, some of the surplus may be transferred as the asset is used by an enterprise. In such a case, the amount of the surplus transferred would be the difference between depreciation based on the revalued carrying amount of the asset and depreciation based on its original cost. Transfers from revaluation surplus to the revenue reserves are not made through the statement of profit and loss.*

Since only a very few Indian Companies resort to adopting Revaluation model for accounting depreciable Tangible Assets under Ind AS 16, attributable to substantially justifiable reasons, more so, as reverting from revaluation model to Cost Model does not seem permissible. Though analysed dispassionately, arguably, the Revaluation model under Accounting Standard Ind AS -16 appears more academic and less practical, albeit it contains detailed prescriptions conforming to International Standards of accounting. In fact, the earlier Accounting Standard AS-10 "Property, Plant and Equipment" under Indian GAAP contained simpler prescriptions in this regard, vide its Para 13.3, though with lesser guidance on the Book-keeping aspects connected therewith.

We, the Company Secretaries, as signatories to the Financial Statements, would do well to possess a fair knowledge of the Accounting Standards applicable to the Organizations we serve and add value to our professional competence besides the Organizations' Financial Reporting efficiency, lest we should be blamed for any laxity whether deliberate or inadvertent.

# Private Placement - Clutched dominion



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## Introduction:

Control!!! Absolutely, almost everyone wants to control a thing, situation, person or any circumstances, however, purpose of controlling may differ from person to person in consonance with situation. Control refers to having dominance over person or situation or we can say that let the things happen according to one's wishes or prejudices. Going hand in hand, promoters of a Company do not want to let the control shift to outsiders, with fear in mind that others will take control of their hard-earned business. But sometimes they have to approach outsiders for meeting business requirements like money, professional expertise, joint venture agreement, trading rights etc. In this article, we will discuss about private placement of securities. So, let's begin with the journey:

## Private placement of securities

Private placement of securities refers to sale of securities to identified persons (Investors) who has been identified by the Board of Directors rather than approaching to general public. Identified person term has not been defined anywhere in the Companies Act, 2013(the 'Act'). Basically, identified persons are known as Private Equity's or some of popular investors like Black Stone, Goldman Sachs, etc. That particular Investor has been considered as appropriate identified person for the company, after considering respective company's requirement along with relevant due diligence corresponding with vision of promoters or Board of Directors.

Private Placement of Securities is one of the ways to raise funds by the Companies without following / complying with complex rules and regulations. In the recent scenario, the Private Placement of Securities has got a catch in the market and has become most popular practice to avoid fear and threats of a hostile takeover. In India, the practice of Private Placement has gained importance due to prolonged and subdued conditions in case of raising funds through new issues or initial public offer or a further public offer. In terms of instruments of raising fund, an equity share is the most preferable instrument

## Things to Know about Private Placement of Securities:

### a. Any Kind of Securities

["Securities" means the securities as defined in section 2(h) of the Securities Contracts (Regulation) Act, 1956] which can be issued under the issue of Private placement and not restricted to only equity shares.

### b. Number of Persons to whom company shall issue shares under private Placement

Private Placement shall be made only to identified persons and such identified number of persons should not exceed fifty (50) at a time or calculated individually for each kind of issue, maximum fifty persons can subscribe to the offer and should not exceed two hundred (200)\*\* in any financial year.

[Cumulative for all kind of issues of private placement in any financial year the number of persons shall not exceed two hundred (200)].

The Limit of two hundred (200) persons shall count individually for each kind of security issue viz. equity shares, bonds, and debentures.

The Limit of two hundred persons does not include qualified institutional buyers (QIB's) and employees of the Company who are offered securities under the scheme of ESOP (Employees stock option). Basically, they are excluded from the limit of 50 and 200.

Option of Private placement of securities is available for all companies whether it's listed or private or NBFCs or any other company.

### **In case of listed Companies**

In case of listed entities, the ICDR Regulation provides for the private placement of equity shares and convertible securities through the following routes:

QIP under chapter VI of the ICDR Regulation- through this route a listed company, subject to approval from its shareholders, may privately place its securities with QIBs. For the purpose of complying with minimum public shareholding norms, the promoters and other members of the promoter's group are also permitted to offload their stake in the Company as an offer for sale. In QIP, an issuer

is required to issue a placement document to potential investors, which is to be filed with the stock exchange. The pricing of securities should be as per pricing norms prescribed under ICDR Regulation.



#### **c. In the case of Non-banking financial companies (NBFCs)**

Private Placement of NCDs of maturity of more than one (1) year in case of NBFCs, there are two separate conditions-More than One (1) Crore per investor or less than One (1) Crore per investor. In the case of NCDs issuances with less than one (1) Crore per investor then there is a limit of 200 subscribers for issue for any financial year and for issuance of one (1) crore or more per investor, there is no limit on the numbers of subscribers.

#### **d. Private Placement of Securities or issue does not have any right of renunciation which is available in case of right issue.**

#### **e. When it can become public issue**

When such issue of securities is made in breach or contravention of the provisions of section 42(2) and rule 14 of Companies Act, 2013 then that offer shall be deemed to be a public offer under the Companies Act, 2013.

**f. Offer should not be advertised**

Company shall not release any public advertisement or any media, marketing or distribution channels or agents to inform the Public at large. Here, wordings used is public advertisement which means that entity can attract its parties indirectly through its various direct as well as indirect channels like business connections, and distant relatives etc.

**g. Mode of Payment**

All monies received towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash.

**h. Minimum gap between offers**

Company cannot come with a new offer until and unless completion of prior offer. However, no fresh issue or invitation shall be made unless the allotment of Securities with respect to any previous offer or invitation has been completed or has been withdrawn or abandoned by the Company.

**i. Penalty**

If a Company makes an offer or accepts monies in contravention to the regulations under Sec. 42 of the Companies Act, 2013, the Company, its promoters and Directors shall be liable for a penalty up to the amount involved in the offer or invitation or INR 2 crore, whichever is higher, and the company will be liable to refund all monies to subscribers within a period of 30 days of the order imposing penalty.

**j. The issuer is restrained from using any of the money raised vide Private Placement until two pre-conditions have been fulfilled -**

- a) The allotment has been made, to completion
- b) The return of allotment, in the electronic form PAS-3, is duly filed within 15 days of allotment to the Registrar of Companies.

**k. Offer letter Cum Application Letter**

A Private Placement offer letter cum application letter shall be in the form of application in FORM PAS-4 serially numbered and addressed specifically to the persons to whom an offer is being made and shall be sent to him, either in writing or in electronic mode, within thirty (30) days of recording the name of such persons pursuant to section 42(3) of Companies Act, 2013.

Provided that no other person shall be allowed to subscribe offer of private placement other than those have been addressed through a private placement offer letter cum application letter.

**FORM PAS-4 is the Format of Offer Letter in case of Private Placement of Securities.**

The Company shall maintain a complete record of private placement offers in FORM- PAS-5.

**Procedure for the allotment of Securities as a Private Placement:**

1. Alteration of AOA should be required to give effect to the private placement, if necessary.
2. Hold a board meeting and pass board resolution and also approve the notice of AGM/ EGM along with the explanatory statement for holding General Meeting of Shareholders for the Private Placement of Securities.
3. After passing Board resolution, filing of MGT-14 as per sec.179 (3) of Companies Act, 2013.

4. Open a separate bank account with scheduled commercial bank for issue Private Placement. **[This Separate bank account is only used for the purpose of receiving monies in case of issue of private placement of securities. If the use of bank account is specific, then there is no need to open separate bank account for every time of issue of private placement.]**
5. Hold the **AGM/EGM** as per **Secretarial Standard-II** and pass the special resolution by the shareholders of the Company and also approve the offer letter and authorize an officer of the company to give effect to the private placement.
6. After passing special resolution in General Meeting, **MGT-14** is required to be filed, for Company cannot issue offer letter until and unless file **MGT-14**.
7. Obtain a valuation report from Registered Valuer as per **Sec. 247** of Companies Act, 2013. (Mandatory to obtain valuation report in case of private placement).
8. Pricing for issue of Shares through private placement may be face value of shares but not less than the fair price calculated by the Register Valuer (not below the price mentioned in valuation report) to investors on a private placement basis.
9. Open a separate bank account and company must keep received monies in that account only and shall not utilize the monies for any purpose other than, **for adjustment against allotment of securities and repayment of monies where the company is unable to allot securities** unless the allotment is made and return of the allotment is filed within 15 days of a time limit with the Registrar of Companies. Afterward, the company is allowed to move the funds in the regular bank account and use for day to day transactions. In case company is unable to allot its securities within sixty (60) days, the Company shall refund the application money to subscribers within fifteen (15) days from the expiry of sixty (60) days and if the company is unable to repay application money, then Company shall repay to the investors due money with interest at @ 12% p.a from the expiry of sixty (60<sup>th</sup>) day [Sec.42 (6)] of Companies Act, 2013.

In case application money is not refunded as per sec. 42(6), then the amount pending for refund shall be treated as Public Deposit as per sec. 73 of the Companies Act, 2013.

10. Receive the confirmation letter from all proposed allottees giving consent to subscribe to the issue.
11. Prepare the list of allottees along with all the required details as per the format given under **FORM-PAS-5**.
12. Hold the Board meeting for allotment of securities.
13. File **FORM PAS-3** and **FORM MGT-14** within 15 days of allotment and attach special resolution, detailed list of allottees and Valuation Report.
14. Intimate the Investors about the Outcome of the Board Meeting.
15. Issue Share Certificate; make relevant entries in the Register of Members along with confirming the distinctive number and Share certificate number of the shares allotted.

### **Is there any adverse effect of Private Placement to the concerned Co.?**

Prima facie, there's no adverse effect visible to the concerned Company by way of private placement but in long term it will cause great impact like, a man is a social animal and the characteristic of greed can't be removed from his soul. Identified persons or investors may think or plan to take over the company as they have chances of it as

they are holding some of control of company by way of shareholding and by some arrangements, they may succeed in hostile takeover of the concerned company.

## Conclusions

Private Placement is one of the best ways to raise capital by the Company keeping in mind the urgency of need and complexity of compliances with various statutory cum regulatory provisions. The Private placement has advantages over other equity financing methods, including less burdensome regulatory requirements, reduced cost and time, etc. By way of Private Placement, Management can keep control (through shareholding) to them or we can say that they can assign it to their related parties (indirectly). To sum up, we can assure that private placement is “Hitting two targets with a sole arrow”, i.e., Company can raise funds and along with that company can retain its controlling power with itself, as shares are getting allotted to somehow known persons.

## Disclaimer:

The entire content of this article is author’s own understanding & personal views. This is only a knowledge sharing initiative and authors do not in any way intend to solicit any business or profession.



### Introduction

A gift is a transfer of movable or immovable property from one person to another without consideration. Shares of an Indian company or of a company incorporated outside India held by a person can be gifted to another person (relative or otherwise) by following a certain procedure and are subject to compliance under different legislations of the country.

This article focuses on the permissibility of gifting securities under the relevant provisions of Foreign Exchange Management Act, 1999 (FEMA) and rules, regulations made thereunder and the tax implications on such gift of securities.

### Permissibility of gifting of shares involving a Non-Resident under FEMA

In case of Gift of shares of an Indian Company involving a Non-Resident

The FEMA is enacted to govern foreign exchange in India with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.

The Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (the "FDI Rules"), the Foreign Exchange Management (Debt Instrument) Regulations, 2019 (the "Debt Regulations"), and the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 which supersede the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2017 (the "TISPRO") contains provision of transfer of security of an Indian company.

The FDI Rules allows transfer of shares of an Indian company to/from a Non-Resident in the form of gift, since under the Act, gift is considered as one of the modes of transfer of security. However, this shall be subject to conditions as below:

- I. **Transfer by way of gift by Non-Resident (not being NRI or OCI) to another Non-Resident is permitted subject to the following conditions:**
  - a. prior government approval is required for any transfer in case the company is engaged in a sector which requires government approval;
  - b. In case if the shares are by the transferor holding on non-repatriable basis to transferee who intends to hold on a repatriable basis, shall be in compliance with and subject to the adherence to entry routes, sectoral

caps or investment limits, documentation and reporting requirements for such transfers, as prescribed under FDI Rules;

**II. Transfer by way of gift by Non-Resident to Resident is permitted subject to the following conditions:**

- a. the transfer by way of gift shall be in compliance with and subject to the adherence to documentation and reporting requirements for such transfers as may be specified by the Reserve Bank from time to time;
- b. These provisions shall not apply to transfer by the Non-Resident who is holding shares on a non-repatriable basis.

**III. Transfer by way of gift by Resident to Non-Resident:**

**This require prior approval of the Reserve Bank of India and such approval is subject to the following conditions:**

- a. the Donee is eligible to hold such a security under FDI Rules as amended from time to time;
- b. the gift does not exceed five percent of the paid-up capital of the Indian company or each series of debentures;
- c. the applicable sectoral cap in the Indian company is not breached;
- d. the Donor and the Donee shall be “relatives” within the meaning in clause (77) of section 2 of the Companies Act, 2013;
- e. the value of security to be transferred by the transferor together with any security transferred to any Non-Resident as gift during the financial year does not exceed the rupee equivalent of USD 50,000;
- f. such other conditions as considered necessary in public interest by the Central Government.

### **Reporting Requirement under FEMA Regulations**

The Form FCTRS will have to be filed within 60 days from the date of transfer of shares by way of gift. The onus of submission of the Form FC-TRS within the given timeframe would be on the Donor/Donee, resident in India.

### **In case of Gift of shares of a Company incorporated outside India involving Resident**

The Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations 2004 (ODI Regulations) will govern in relation to transfer of shares by way of gift of shares of a foreign company between resident and non-resident.

The RBI has given general permission for transfer of shares by non-resident held in a foreign company by way of gift to a resident. However, any transfer of shares of foreign company between two Residents in India or from a resident to a non-resident would require prior approval.

### **Current Scenario of Gift tax in the Income Tax Act**

#### **In the hands of donee**

As per section 56(2)(x) of the Income Tax Act, 1961, any person who receives the shares by way of gift shall having total fair market value exceeding INR 50,000/-, shall be considered as deemed income in the hands of donee.



### **In the hands of donor:**

Gift of shares is exempt in the hands of donor in terms of section 47 of the Income Tax Act, 1961.

### **General Exemption**

In case of gift of shares in case of following:

- i. from any relative\*; or
- ii. on the occasion of marriage of an individual; or
- iii. under a will or by way of inheritance; or
- iv. in contemplation of death of the donor; or
- v. from any local authority; or
- vi. from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution; or
- vii. from or by any trust or institution registered; or
- viii. by way of transaction not regarded as transfer; or
- ix. from an individual by a trust created or established solely for the benefit of relative of the individual; or
- x. from such class of persons and subject to such conditions, as may be prescribed.

The Income Tax Act defines relative in relation to an individual, to mean the husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

### **Conclusion**

Gift of shares is considered to be most regulated activity under FEMA. This is applicable when donor is a resident in India and donee is a non-resident or vice versa. In case of many start-ups, we have seen that gift of shares are considered as one of the modes of remunerating by Founders to others to avoid dilution of shareholding of other shareholders, it is pertinent to note that certain implications would cause adverse effect unless the same is in compliance as detailed in this article. At many instances, the prior approval is required and if it doesn't qualify as gift, then tax implication would arise.





## Payment of Wages - Looking for a Difficult Balance in Shaky Times -Ficus Pax Pvt. Ltd. V. Union of India

We have heard all too often over the last few months that these are unprecedented times. That to me, has just been an expression of the confusion and helplessness we find ourselves in. We might find ourselves better motivated to find solutions to the problems we face if we recognize that while these might be unprecedented times, they are also precedent setting times. The solutions we innovate at this time, will doubtless guide us in future crises. The order of the Supreme Court in Ficus Pax v. Union of India on 12th June, is one such decision.

Consequent to the imposition of the lockdown in the wake of the COVID-19 pandemic, the Ministry of Home Affairs on 29.03.2020 issued an order under Section 10(2)(1) of the Disaster Management Act, 2005 followed by similar orders by various State Governments directing employers in industries, shops and commercial establishments that they shall continue to make full payment of wages without any deductions for the period their establishments are under closure during lockdown.

As can be expected, these notifications were challenged both by employers, and by industry associations by way of writ petitions which were considered by the court in Ficus Pax v. Union of India. These writ petitions were opposed not only by the Government, but also by employee unions in the form of intervenors.

The Petitioners assailed the notifications mandating payment of wages primarily on these grounds:-

1. Section 10(2)(1) of the Disaster Management Act, 2005 cannot be invoked to impose a financial burden on the private sector.
2. The power under the Act does not vest with the home secretary.
3. The Central and State Governments respectively have the right to constitute disaster response funds which can be utilized to compensation to workers.
4. The governments can utilize funds from the Employee State Insurance Corporation.
5. Order dated 29.03.2020 was only with regard to migrant labour. Should not be broadened to cover all labour.
6. Companies have varying capacities and financial resources. To club all companies is to treat unequally situated companies equally.

This was resisted by the Government with the following arguments:

1. The power to issue the order dated 29.03.2020 can certainly be traced back to Section 10(2)(1) of the Disaster Management Act, 2005.
2. The measure was taken by government to proactively prevent perpetration of financial distress amongst the lower strata of society.
3. They are an economic welfare measure.
4. The impugned order has been revoked with effect from 18.05.2020, it was in effect only for a period of 54 days and as such no interference is now required.

The government was supported in this by the intervenors who raised the following contentions:

1. The orders were issued with a view to contain the spread of the disease.
2. When the Government issues an order of a lockdown, they should also make arrangements to deal with the consequences of the lockdown.
3. The employers have been adequately taken care of by the financial package advanced by the government.
4. The Disaster Management Act is a self-contained code which overrides other legislations.

The Supreme Court deemed it fit that these issues be considered in detail at a later point of time. However, the Court brought two important findings on record.

1. The lockdown has equally hurt employers and employees.
2. Labour and industry are co-dependent on each other cannot exist without each other.

Based on these findings which sought to find common ground rather than make it an adversarial process, the Supreme Court issued the following directions in a spirit of pragmatism:

1. Private establishments who are willing to negotiate the wages with their workmen may initiate such a process. If they are unable to settle it amongst themselves, they have the power to refer the matter to the appropriate labour authority for conciliation. In the event a settlement is arrived at, that may be acted upon irrespective of the government circular.
2. The above shall also apply to establishments which were working at less than full capacity during the lockdown.
3. Private establishments shall permit the willing workers to work in their establishments without prejudice to their claims on the remaining unpaid wages.

The order was directed to be communicated to employers and employees alike.

The order is clearly seeking to find a balance rather than an answer in law and it is tailored to meet the needs of the moment. It is indeed possible that such conciliatory jurisprudence is what is required for troubled times and that this kind of thinking will inform the decision makers in future crises.



## BRIANY BITS...

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M/s ABC Ltd. has paid premium on employee related welfare insurance and a special coverage for COVID-19 pandemic as a part of the package. Examine the eligibility of Input Tax credit on the Insurance premium paid for the employee welfare in light of GST provisions



## Opinion to Last Month's Brainy Bits

Mr.A is a manufacturer of water tanker to be fitted with a motor vehicle to be used in Agriculture. He has GST input tax being accumulated in his books to higher rate of GST paid on inputs and lower rate of tax applied on the goods supplied. Examine the GST provisions relevant for claiming refund for such GST accumulated in the books.

### Facts of the case:

- Mr.A (hereinafter referred as supplier) is a manufacturer of Water tanks
- Such water tank is fitted on a motor vehicle and is taxable @12%
- Supplier procures raw material i.e. steel and other consumables along with capital goods which attract GST of 18%
- Supplier has month on month ITC being accumulated not exhausted to the above pattern technically referred as "Inverted Duty Structure". i.e. Tax paid on outward supply is 12% compared to the inputs and capital goods is 18%

### Relevant citation:

Section 54(3):

Where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council

Rule 89: Application for refund of tax, interest, penalty, fees or any other amount

Form GST RFD01 for filing refund application

### Conclusion:

Supplier can file the refund application for the business carried on by him due to Inverted Duty structure. Care should be taken that as per Section 54 only notified goods are under restricted category for claiming refund. Currently,

supplier products are not covered under any specific restricted category and accordingly refund can be sought on the Inputs which attract higher rate compared to the outward supply. Care should be taken that, no refund shall be eligible in relation to Capital Goods or Input Services accumulated due to Inverted duty structure.



## Regulatory Updates

Compiled by:  
**Matruka B M**

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### Companies Act, 2013

#### *Updates on Amended Rules*

MCA has amended Companies (Share capital and Debentures) Rules, 2014, which shall be known as Companies (Share capital and Debentures) Amendment Rules, 2020.

**In the Companies (Share capital and Debentures) Rules, 2014, following shall be substituted in the second proviso of sub-rule (4) of Rule 8**

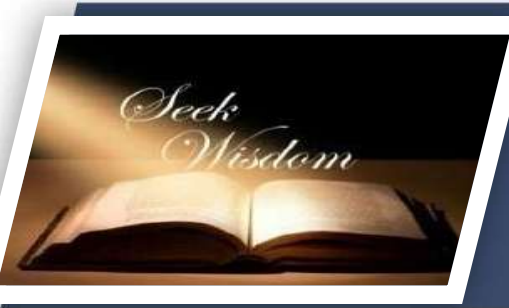
- i. For the letters, figures, brackets and words "GSR 180(E), dated 17th February, 2016 issued by the Department of Industrial Policy and Promotion", the letters, figures, brackets, and words "G.S.R. 127(E), dated the 19th February, 2019 issued by the Department for Promotion of Industry and Internal Trade" shall be substituted;
- ii. For the words "five years" the words, "ten years" shall be substituted.

**In the said rules, in rule 18, in sub-rule (7), in clause (b), for sub-clause (v), following sub-clause shall be substituted, namely: -**

"(v) In case a company is covered in item (A) of sub-clause (iii) of clause (b) or item (B) of sub-clause (iv) of clause (b), it shall on or before the 30th day of April in each year, in respect of debentures issued by such a company, invest or deposit, as the case may be, a sum which shall not be less than fifteen percent., of the amount of its debentures maturing during the year, ending on the 31st day of March of the next year in any one or more methods of investments or deposits as provided in sub-clause (vi):

Provided that the amount remaining invested or deposited, as the case may be, shall not any time fall below fifteen percent of the amount of the debentures maturing during the year ending on 31st day of March of that year."

**Companies (Share capital and Debentures) Amendment Rules, 2020, dated 5th June 2020**



## Commentary on Independent Director- Data Bank - Series-22 - Part III

Provisions: Section 150 r/w Rule 6: The following individuals shall apply to Indian Institute of Corporate Affairs (IICA) at Manesar for inclusion of his name in the databank for a period of 1year or 5years or Lifetime:

### 1. Who:

- a) Existing Independent Director as on 01/12/2019, within 7months of Commencement of aforesaid date i.e., before 30th June 2020.
- b) New Independent Director: Who intends to get appointed as an Independent director, before such appointment

**2. Renewal:** Individual having their name included in the databank, can renew their application for further 1 year or 5 years of lifetime in databank within expiry of 30 days.

**3. Declaration:** Individual shall submit the declaration of compliance of Rule 6 (1) & (2) along with declaration under Section 149(7).

**4. Self- Assessment Test:** Individual having their name included in the databank, should pass an online proficiency test conducted by the institute obtaining a score of not less than 60%, in any number of attempts, within a period of one year from the date of inclusion of name in the databank.

**Exception:** Individual who has served as a Director or KMP a period of not less than 10 years as on the date of inclusion of name in the databank in:

- a) Listed Public Company or
- b) Unlisted Public Company having Paid Up Share Capital of Rs.10 Crore or more or
- c) Body Corporate listed on Recognized Stock Exchange.

**Note:** For the purpose of Calculation of 10years, any period for which the person was acting as a Director or KMP in 2 or more Companies or Body Corporates shall be counted only once.

### 5. Removal of Name form data Bank:

1. If he fails to renew the application within 30 days.
2. If he fails to pass the online proficiency test within a period of one year from the date of inclusion of name in the databank.